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Supreme Court of the United States.

OCTOBER TERM, 1913.

JOHN MILLER,
Appellant
vs.
THE UNITED STATES. } No. 178.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

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Statement of the Case.

I.

This case comes here on appeal from the Court of Claims, and it is reported in 47 C. Cls., 146. The case is based on a contract dated Feb. 1, 1906, for carrying the mails from Valdez to Eagle, Alaska, and back, once a week, from Nov. 1 to April 30, and twice a month from May 1 to Oct. 31, each year, in a close connection at Valdez with steamers to and from Seattle, Wash., at the rate of $46,000 per annum, "for and during the term beginning" July 1, 1906, and ending June 30, 1910 (Rec. 2). The route described in the contract was 458 miles long (Rec. 14, 15).

II.

The contract was executed by John R. Crittenden, and appellant Miller was one of his sureties (Rec. 2). Crittenden was unable to command the necessary capital to perform the contract, and, "therefore, appellant was obliged to and did expend the money needed to buy harness, sleds, horse feed, horses and dogs to carry the mails, and by July 1, 1906, the contractor and petitioner [appellant] as his surety, was ready to begin the performance of the contract, and the contract was performed to the satisfaction of the Government until the service was . . . discontinued by the Postmaster General" (Rec. 8).

Afterwards, May 1, 1908, Crittenden entered into a contract of sub-letting with appellant, by which the latter undertook to carry the mails on the route under the contract of February 1, 1906 (Rec. 8). That contract had the written consent of the Postmaster General (Rec. 9), and appellant alone performed the original contract (Rec. 8, 10-16).

When it developed that Crittenden was not able to command the capital above mentioned, appellant advanced $15,000 for the first year's supplies and entered into a contract of partnership with Crittenden, so as to be protected in his advances and make sure that the contract should be performed. That partnership was dissolved by mutual consent February 15, 1908, but the relation of principal and surety existed until the end.

III.

For many years the regulations adopted and enforced

by the Department have authorized the Postmaster General to discontinue or curtail the service, in whole or in part, in order to secure a "better degree of service" or "superior service," or whenever the public interest, in his judgment, should require such discontinuance or curtailment for any other cause, he allowing, as a full indemnity to the contractor, one month's extra pay on the amount of service dispensed with, and pro rata compensation for the amount of service retained and continued. Prior to 1874, and afterwards, regulation 263 dealt with that subject. Before 1893 it was amended and stood as section 817, but subsequently it was slightly amended and made section 1277. Those sections are copied on Rec. 6, 7.

The regulation, whatever its language or its number, was not drawn and promulgated with reference to the conditions existing in Alaska on Route No. 78108 during the period covered by the contract, but it was drawn and promulgated with reference to conditions existing within the limits of the United States and exclusive of that route in Alaska, and particularly without reference to the described conditions existing in that part of Alaska covered by the contract sued on (Rec. 7).

IV.

In the preparation of the forms of advertisement, proposal, and contract the government officials adopted the regulation in force, and such advertisement, proposal, and contract were drawn and printed for general use, and the proposal and contract were presented for execution, without particular regard to the physical, climatic, or

other conditions then existing or that might exist along the route during the contract period of four years. At the execution of the proposal and contract, and of the subsequent contract of subletting, Crittenden and appellant did not think or believe that the contract would be discontinued or terminated in any manner or form, but, on the contrary, they believed that the contract would be in full force and effect during the whole contract period, and they named the amount of annual compensation in that belief. They expected that they would encounter losses of profits in a portion of the contract period, but would earn good profits before the contract period ended, and for the whole contract period. Had Crittenden and appellant believed otherwise than as above stated, they would not have executed either of the contracts for that annual compensation, nor would appellant have made the arrangements and expenditures in the early part of 1903 [1908], in the record described. On the contrary, appellant made such arrangements and expenditures in the belief that the contract would be in force for the full contract period. If the government had asked bids for a two-year contract on that route Crittenden would not have submitted a bid at all, and appellant would not have become surety on any contract for less than $92,000 per annum, because the conditions were such that the expenses of carrying the mails on the route would be far heavier for carrying them in 1906 than in 1907, and in 1907 than in 1908, and in 1908 than in 1909. As an illustration, appellant avers that it cost $151,169.55 to perform the contract until it was discontinued by order of the Postmaster General, that amount being $48,595.08 more than the total sum received from the government,

but it would only have cost him $43,390 to perform the contract for the remaining twenty-two months of the contract period, during which time he would have received $84,326.00 for carrying the mails, a profit of $40,936 (Rec. 7).

V.

The existing physical and climatic conditions in that region are set forth in much detail in the ninth and tenth parts of the petition (Rec. 10-13), and we find it impossible to summarize them briefly. We can only say that they would seem appalling to any but those brave and hardy men who have carried the blessings and the necessities of civilization into the far North.

It seems almost incredible that men and horses were able to exist in the conditions described in the petition. Some were frozen to death but the work went on just as appellant had agreed. Wherever a work has to be done the men are raised up to do it, and in this instance horses, bridges, trails and roads were built, repaired, maintained, and left for the use of those who traversed that dreadful region (Rec. 12, 13, 14).

The petition alleges that the described physical and climatic conditions were matters of common knowledge in that part of Alaska, and were known to the agents of the Department (Rec. 12).

VI.

The ninth and tenth parts of the petition (Rec. 10-13) deal specially with the state of things and the performance of the contract in 1906, 1907, 1908, while the

eleventh sets forth the large, necessary and costly outfit put on the route by appellant for 1908 and the winter and spring of 1909, in the belief that the contract would be in force to the end of the contract period. While the expenditures were large, yet appellant was able to cut them down greatly for the summer of 1908 and subsequently. Conditions were getting better and the business was going on nicely. Trail and bridge work was done so the contract might be performed, as the Government did not make allowance for delays, whether caused by snows, storms, blizzards, the freeze-up in the fall, the break-up in the spring, or any other consideration, but fines were charged at every opportunity (Rec. 13, 14).

It is alleged that these facts and conditions were matters of common knowledge in that part of Alaska, and were known to the agents of the Department (Rec. 13).

VII.

August 11, 1908, the Postmaster General decided, and appellant was notified later, that the service on the route should be discontinued September 30, 1908, and that he would be allowed one month's pay. If he had been informed in February, 1908, that the service would be discontinued in whole or in part he would not have gone to the expense of putting the one year's supplies on the trail between Valdez and Eagle. Most of the horse-feed between Chistochina and Ketchumstock was lost. It had taken two years to get the trail in good condition for carrying the mails, the amount of which in that time had increased largely, for the country was settling up with ranchmen, prospectors, and mining men. If the

government had let the contract run the entire four-year term, appellant could have made enough money out of the performance of the contract to have recouped about all the losses sustained. The service was discontinued at a time when the contract had a year and nine months to run, in which time petitioner would have earned $84,-326 under the contract, and have made profits that would have reimbursed about all the losses previously sustained.

In 1906 and 1907, the freight rates on supplies had cost petitioner heavily. For instance, the rates from Valdez to Chistochina were 22 cents per pound, and to Mantasta 32 cents per pound. But in 1908 the freight rates had been reduced enormously, because the trails were improving, and the government was expending large sums of money in repairing the trail between Valdez and Gulkana, these improvements assuring good trails in the future and much lower freight charges. By the spring of 1910, the freight rates had dropped off one-half from what they were three and four years before.

As soon as the government road had been put in condition, the mail men used wagons between Valdez and Gulkana, and while it had taken six or seven horses to carry the mails by appellant between the points named, two horses hitched to a buckboard carried the same mails for the new contractors and made better time; fewer men were needed and the service cost much less than before. These conditions, and all other controllable conditions, would have been to the advantage of appellant, and would have enabled him to recoup the loss that he had incurred up to September 30, 1908.

The following is a profit and loss statement for the period covering the actual life of the contract:

Disbursements on account of labor, feed, expenses on the route, including expenses of maintaining stations, etc.....	$110,040.03
Disbursements on account of Scott & Frase, sub-contractors	41,129.52
Total disbursements.....	$151,169.55
Total receipts from the Post Office Department	$102,572.41
Total losses	$48,597.14

(Rec. 14, 15.)

VIII.

The thirteenth part of the petition (Rec. 15, 16) sets forth orders made by the Postmaster General, beginning Aug. 11, 1908, discontinuing the service on route 78108 to take effect Sept. 30, 1908, and immediately and thereafter establishing service on various parts of that route.

The service in the region covered by route 78108 was not discontinued except as to that part between Chicken and the junction of the Chistochina and Copper rivers, a distance of 190 miles, and in the remainder of the region covered by route 78108 service was continued from September 30, 1908, as is shown by the orders, fewer trips being made and less weights being carried. The orders operated as a change of service only on route 78108, except as to the discontinuance of mail service between Chicken and the junction of the Chistochina and Copper rivers.

The Postmaster General did not ask appellant to con-

sent to any modification of the contract, or to its discontinuance, nor did he advertise that proposals would be received for changes in the terms of such contract.

All the points named in those orders had been faithfully served under the contract in suit, and appellant could and would have performed the contract at a profit to himself of $48,936 for the remainder of the contract period; and the performance of the contract would have enabled him also, to avoid losing the property in 1908 and 1909, in the sum of $5,800 for horse-feed alone, and $5,000 for buildings, which loses could and would have been avoided through performance of the contract.

Appellant was excluded from the performance of such services by the Postmaster General, to his great loss and damage, over his objections and protests, and against his wishes and desires (Rec. 15, 16).

IX.

This action was brought to recover damages for profits and property lost (Rec. 16).

The Record Below.

Petition was filed in the court below Jan. 4, 1911 (Rec. 1). General demurrer was filed Jan. 25, 1911 (Rec. 17). The opinion of the court was filed Dec. 4, 1911 (Rec. 17-20). The demurrer was sustained and the petition was dismissed on the same date (Rec. 20). Application for appeal was made and allowed Jan. 16, 1912 (Rec. 20, 21).

Errata.

At some places in the record, such as pp. 7, 10, the year appears as 1903 when it should be 1908, and as 1905 when it should be 1906, as the context shows.

Assignment of Errors.

The court below erred:

First. In sustaining the demurrer to the petition.

Second. In adjudging that the petition be dismissed.

Brief of Argument.

I.

Rule for Construing the Contract.

In the construction of the contract, or any particular clause or part of it, the court is to examine the entire contract, consider the relations of the parties, their connection with the subject-matter, the circumstances under which it was signed, the state of things existing at the time it was made, the nature of the obligations between the parties, and is to look carefully to the substance of the agreement as contra-distinguished from its mere form, in order to give it a fair and just construction, and ascertain the substantial intent of the parties.

This rule has been established by a long line of decisions, among them are:

Canal Co. v. Hill, 15 Wall., 94, 99-101;

Rock Island Railway v. Rio Grande Railroad, 143 U. S., 596, 609;

Winona & St. Peter Land Co. v. Minnesota, 159 U. S., 526, 531;

U. S. v. Utah, Nev. & Cal. Stage Co., 199 U. S., 414, 423.

We shall make particular use later of the case last cited.

The state of things existing in Alaska at the time the contract was made, during its performance, and at its termination is set forth with detail in the petition for the purpose of informing the court as to the conditions with which the parties had to deal. It is essential that the court be informed of these conditions in order that it may correctly understand the intent of the parties and be able to put the right construction on the contract, and that is why they were set forth in the petition in such detail (Rec. 10-14).

The state of things existing at the time the contract was made, and the purpose of extending the advantages of civilization to a remote region under circumstances of extreme difficulty and at a heavy expense to the contractor, particularly in the earlier years of the contract, naturally and inevitably made the contractor believe, and he did believe, that he would have the whole contract period in which to reimburse himself that enormous outlay and also secure a profit. The business could not have been done on any other basis, and it was done on exactly that basis in this instance, as the petition avers (Rec. 7, 9, 13).

We will now enumerate some of the considerations that we think to be of controlling force in this case.

(a) The nature of the service to be rendered, the disbursements to be made on account of labor, food, sup-

plies, horse-feed, equipment of all kinds, erecting and maintaining stations, houses, cabins and cache houses on the route, making and maintaining trails, roads, and bridges, the general expenses of the service, etc., laying in and placing along the route necessary supplies of all kinds each winter, and procuring expensive outfits to enable the contractor to perform the service for each year (Rec. 2-6, 7, 8, 10-15).

(b) It was necessary to expend $15,000 in the purchase of horses, harness, sleds, horse-feed, and dogs in beginning the rendition of the service (Rec. 8, 10), and by the fall of 1905 [1906] appellant had expended more than $20,000 before any payments were made by the government (Rec. 10), and the necessary equipment had to be maintained and added to during the whole period of service (Rec. 12-16).

(c) The freight rates in 1906 and 1907 from Valdez to Chistochina were 22 cents per pound, or $440 per ton, and to Mantasta were 32 cents per pound, or $640 per ton (Rec. 14), in March and April, 1907, the contractor, in making a shipment of twenty tons of horsefeed from Fairbanks to Tanana Crossing paid 16½ cents per pound, or $330 per ton, for transportation, that being the lowest freight charge obtainable, and in 1908 the freight on horse-feed cost him from eight cents per pound, or $160 per ton, to 11½ cents per pound, or $230 per ton (Rec. 12-14). To those rates must be added the cost of food for the men and feed for the horses at the coast and on the Yukon, and the necessity of taking the same to the various stations in the winter, when sleds could be used, thus laying up supplies for one year in advance, for it was necessary that food stuffs and

supplies for the men and the horses had to be purchased and taken to the various stations in the winter for a year in advance (Rec. 12-14 and *passim*).

(d) We know that the experience of all contractors, in the performance of a contract embracing unusual or severe conditions, is that by far the heavier part of the expenditures fall within the first half or two-thirds of the contract period, and that the lighter expenditures fall in the remaining or latter part of the period. The conditions confronting the contracting parties here were such as to make it apparent to them that such would be the experience of the contractor, and that his only hope of compensation, to say nothing of earning profits, lay in the belief that the government would not discontinue the service at any time during the four-year period (Rec. 7, 9, 13).

(e) If the contract had been made for one year it would have been inevitably for a far larger sum than $46,000 per annum, and the same would have been true had the contract been made for two years (Rec. 7) or if it had been made to expire September 30, 1908, the date the discontinuance was made effective. It is not reasonable that the contractor would have named $46,000 as the annual compensation for a contract period of less than four years. The length of the contract period was the inducement which caused him to name that amount as annual compensation. It stands to reason, and it is a fact, that a shorter period than four years would have resulted in a corresponding increase in the amount of annual compensation fixed by the contractor (Rec. 7).

(f) The contract required the contractor to carry the

mails at the annual compensation of $46,000, "for and during the term beginning" July 1, 1906, "and ending" June 30, 1910 (Rec. 2), and it obligated the contractor in its next paragraph to "carry said mail with certainty, celerity, and security, . . . during the term of this contract" (Rec. 2). Near the end of the contract (Rec. 6) there is a stipulation that the contract, in the discretion of the Postmaster General, may be continued in force beyond its express term for a period of six months, until a new contract with the same or other contractor should be made (Rec. 6). The use of all this formal and positive language must have encouraged the belief of the contractor and his sureties that the contract would be in force four years at least.

Having in mind all these things, we now ask this question: Is it possible that one month's extra allowance was intended by all the parties to be in compensation of the inevitably large losses,—far larger than one month's extra pay,—if the *entire service* were to be discontinued at any time, and under any circumstances, at the option of the Department?

II.

Construction To Be Put On the Discontinuance Stipulation. Plan For Future Relief Suggested.

The discontinuance stipulation should be so construed as not to apply to a case in which the payment of one month's extra pay would be grossly inadequate as indemnity or compensation to the contractor.

The "discontinuance" stipulation (Rec. 4), is as follows:

> It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service, in accordance with law, by allowing not to exceed a pro rata increase of compensation for any additional service thereby required; and, in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor, one month's extra pay on the amount of service dispensed with, and not to exceed a pro rata compensation for the service retained; but no increase of compensation shall be allowed for a change of service not amounting to an increase, nor indemnity of month's extra pay for any change of service not involving a decrease of service.

1. The stipulation as to the amount of the "full indemnity" of one month's extra pay on the amount of service dispensed with applies alike to "decrease, curtailment, or discontinuance of service." We submit that this stipulation may be fair enough in case of decrease or curtailment and yet grossly unjust in case of discontinuance. A decrease or curtailment might reduce the cost of service to the contractor and be of little or no damage to him, while a discontinuance might be of immense damage. The literal and strict construction of this stipulation would produce that result in the case at bar, but such a result is to be avoided if possible within the rules of law, as we shall see presently.

Is it not more reasonable and just to all concerned, interpreting the contract with the then existing state of

things in mind, as well as the certainties of the future, to hold that the provision for one month's extra pay—$3,833.33—as a "full indemnity" was intended to apply to a situation entirely beyond the scope of this particular action—a situation in which the payment of that amount of money would be "full indemnity" to the contractor for the losses incurred? We submit that this contract should be so interpreted as to apply only to a case in which the payment of that sum would fully indemnify the contractor, and not apply to a case in which it would be grossly inadequate as indemnity for the loss or damages.

2. We submit that *United States v. Utah, Nevada & California Stage Company*, 199 U. S., 414, is both instructive and conclusive here. The company entered into a contract for the rendition of service on a mail route in the city of New York for four years. The advertisement (p. 415) notified contractors that they would be "required to perform, without additional compensation, any and all new or additional service that may be ordered from July 1, 1893, or at any time thereafter during the contract term," etc. The contract (p. 416) stipulated that the contractor should "perform all new or additional or changed covered regulation wagon, mail messenger transfer, mail station service that the Postmaster General may order at the city of New York, N. Y., during the contract term, without additional compensation," etc. August 22, 1893, the Department required (p. 417) additional mail service and a further order was made October 23, 1893, for additional mail station service. The additions to the service were large and burdensome (pp. 417-421, 424). The Court of Claims rendered judg-

ment in favor of the company for $83,021 (39 C. Cls., 420, 441).

In this court the government contended (p. 421) that, under the authority of the Postmaster General to require new or additional service without additional compensation, the contractor might be required to perform the additional service made necessary by the establishment of the Industrial Building branch under the authority of the Act of Congress of March 3, 1893. The opinion was written by Mr. Justice Day, who said (pp. 422, 423):

> In order to perform this service under the directions of the department, complainant was required to furnish eighty additional horses, more than thirty additional wagons, and from thirty-three to fifty additional men, requiring an additional distance to be travelled in wagons, over and above the normal increase of 311,939 miles for the period from October 5, 1893, to February 6, 1895, and to pay an increased sum for ferrying the wagons across the North and East Rivers of $9,950.22. Can such enormous increase of the service required and the expense entailed be exacted of a contractor who had agreed to perform new or additional service of the kind specified without additional compensation? There can be no doubt that the purpose of placing this stipulation in the contract was to require the performance, without additional compensation, of new or additional service which might arise from improved methods in the transaction of the business of the Post Office Department and in the increased demand for service resulting from the growth and development of towns and cities.

The opinion then proceeds:

> The contract gave to the Postmaster General

very considerable discretion in calling for additional service which might result from these causes, without compensation. This was well illustrated in the case of *Slavens* v. *United States*, 196 U. S., 229, in which it was held that while the Postmaster General might not order, under such a contract, service of a different character not within the contractual arrangement, he might order, without additional compensation, a change in the service which required the mail to be taken to and from street cars, met at crossings instead of landings and stations. In that case it happened the burden upon the contractor was not increased. But in the present case we find more service required, amounting to additional mileage of hundreds of thousands of miles, and the payment of a large additional sum of money for ferrying wagons to deliver the mails.

Mr. Justice Day next said:

There must be some limit to the service which can be required without additional compensation, under the authority vested in the Postmaster General by the contract, to call for new or additional service of the same character. Otherwise it is within the power of the government to ruin a contractor by new and wholly unanticipated demands, which caution and prudence, however great, could not have foreseen. If this were a contract between individuals a claim of the right to require this vast amount of additional work—evidently not within the contemplation of the parties—without additional compensation, would hardly be seriously entertained. The same principles of right and justice which prevail between individuals should control in the construction and carrying out of contracts between the government and individuals.

The opinion then cites and quotes from cases, holding that in giving a proper construction the court is required to examine the entire contract, consider the relation of the parties and the circumstances under which it was signed, the nature of the obligations between them, and ascertain the substantial intent of the parties in order that it might be given a fair and just construction. Then Mr. Justice Day said (p. 424):

> In this case, after the contract was entered into, this enormous new service, clearly not intended by either of the parties to be rendered, was required. In this instance we think the limit of reasonable requirement under the new and additional service clause was exceeded and the service required cannot be held to be within the terms of the contract. We find no error in the Court of Claims reaching this conclusion.

Here we have a contract stipulation as rigid in terms as the one in the case at bar, and no more rigid, but this court held that the enormous new service was clearly not intended by either of the parties to be rendered, and that the service required was not within the terms of the contract. So, in the case at bar, and upon the same line of reasoning, as we submit, it should be held that the stipulation for the receipt of one month's pay, $3,833.33, in view of the state of things existing and the nature of the obligations, is not to be held applicable to the case in hand.

If this were a contract between individuals the argument that the defendant had been given the right, in the state of things existing on the route and the nature of the obligations, to put an end to the contract and compensate the contractor for his damages by allowing him $3,833.33 would hardly be entertained seriously.

3. The case we have been quoting from was approved and relied upon in *Serralles' Succession* v. *Esbri,* 200 U. S., 103, 113. The question there was whether the contract entitled the appellee to payment on one basis or another, the difference being over sixty per cent more than the value of the thing purchased and sold. After approving the doctrine of the *Utah, Nev. & Cal. Stage Company case,* Mr. Justice Peckham (pp. 113, 114), stated some of the conditions existing at the time the contract was made and said:

> Under the circumstances it is impossible to conceive of sane persons agreeing in this case upon the value of the interest purchased and sold, and then that the purchaser should further agree to pay over sixty per cent more than the value of the thing purchased if it should so happen in the future that different coinage might be in circulation, under a different sovereignty, which would effect that result.

So we say, in the case at bar, that it is impossible, in view of the state of things existing and to exist on the route, to conceive of sane persons agreeing that one month's extra pay—$3,833.33—should be taken as full indemnity on the discontinuance of the contract whenever made and no matter how great the loss and damage to the contractor might be.

Mr. Justice Peckham continued:

> The question may be asked, what did the parties mean by this use of language, if they did not mean precisely what the courts below have said they did, and where is the justification for changing the interpretation as gathered from their lan-

> guage? It may not, perhaps, always be clear to see and determine what parties did mean by the language they used in a contract, and at the same time it may be perfectly clear they did not mean to contract with reference to what the courts below have called the literal and specific import of the language actually used.

We submit that the language quoted is particularly applicable to the case at bar.

"The best construction," said Gibson, C. J., "is that which is made by viewing the subject of the contract as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it. A result thus obtained is exactly what is obtained from the cardinal rule of intention."

Schuylkill Nav. Co. v. Moore, 2 Whart., 491.

We submit that the "mass of mankind" would view this contract as vesting in the Postmaster General the power to give one month's extra pay as "full indemnity" on discontinuance whenever that amount would compensate the contractor for his loss or damage, and as not vesting power beyond that point, certainly not when the contractor would meet with a very heavy loss or damage.

4. *But there is a way to avoid such calamities as this.* It would be easy to do full justice to all parties in unusual, exceptional, or difficult cases of mail service contracts by stipulating that, on the discontinuance of service by the Postmaster General, there should be paid to the contractor a certain specified sum or percentage if such action should become effective in one month, another amount or percentage if it should become effective in three months, and so on, thus dividing the contract period

into appropriate parts and fixing a specific sum or percentage of indemnity for each part. In that way the possible or probable discontinuance of service would be brought so sharply to the attention of the parties that they would consider and discuss the whole situation and agree upon the fair and just division of the contract period, as well as the respective amounts or percentages of indemnity to be paid. Such a stipulation could be so written as to be a complete and lawful ascertainment and liquidation of damages. *Sun Printing and Pub. Assn.* v. *Moore,* 183 U. S., 642.

A stipulation of that kind in this contract would have prevented this litigation.

III.

Arbitrary Or Unreasonable Conduct.

This contract is not to be so construed as to give the officer the power to do arbitrary, capricious, oppressive, or unreasonable things, to the cost or damage of the contractor, for it is implied that the officer will do nothing of the kind.

That is the statement of a well-established rule of law.

U. S. v. *N. A. Com. Co.,* 74 Fed., 145, 149;
Lewman's Case, 41 C. Cls., 470, 478;
Ripley v. *U. S.,* 223 U. S., 695, 701.

1. It is averred in the petition (Rec. 12, 13) that the state of things existing on the route was a matter of

common knowledge in that part of Alaska, and was known to the agents of the Department. Those averments make particularly pertinent the argument of Judge Davis in *Griffith's case*, 22 C. Cls., 165, 193:

> The Postmaster General had to aid him in the decision of this case, the vast and complete machinery of his Department, and must have had all the information as to this route which it was possible for anyone, including this contractor, to obtain. The local postmasters were reporting to him regularly, while the officers of the inspection division were watching this route as they did all other star routes, and, in fulfillment of the duties placed upon them by the regulations, were keeping the Department informed as to the business being done and the manner in which it was done.

Other noteworthy facts are that the contract of subletting (Rec. 8, 9) was entered into between Crittenden and this appellant May 1, 1908, and consented to by the Postmaster General, presumably not earlier than June 1, 1908, while the order of discontinuance is dated August 11, 1908.

2. Again, it is averred in the petition (Rec. 16):

> The mail service in the region covered by route 78108 was not discontinued except as to that part between Chicken and the junction of the Chistochina and Copper rivers, a distance of 190 miles, and in the remainder of the region covered by route 78108 mail service was continued from September 30, 1908, as is shown by the above named orders, fewer trips being made and less

> weights being carried, as stated. The orders named operated as a change of service only on route 78108, except as to the discontinuance of mail service between Chicken and the junction of the Chistochina and Copper rivers, as above stated. The Postmaster General did not ask petitioner to consent to any modification of the contract or to its discontinuance nor did the Postmaster General advertise that proposals would be received for changes in the terms of such contract, in accordance with section 3958, Rev. Stat. concerning changes in contracts.

The averments show an actual discontinuance of service on 190 miles out of the 458 miles of the route (Rec. 15) and that the contractor was not asked to consent to any modification or deduction, or to the discontinuance of the service, nor did the Postmaster General advertise that proposals would be received (Rec. 16). On the contrary, and on the very day the Department ordered the discontinuance of this service, it made two orders, giving parts of the route to other contractors, and it followed up with later orders giving service on other portions of the route to other parties (Rec. 15, 16).

Bad faith is not charged here against the Postmaster General, but the facts pleaded do establish the abuse of power, or the arbitrary, or capricious, or unreasonable exercise of power, without proper regard to the damage done the contractor, and without giving heed to the state of things existing when the contract was made and during the contract period. Neither the law nor the contract vested in the Postmaster General the right to abuse power, or exercise power arbitrarily, capriciously or unreasonably, to the great injury of the contractor, and

without regard to the conditions existing before and during the contract period.

To paraphrase and yet adopt the language and ruling of Mr. Justice Jackson in *C. M. & St. P. Ry. Co. v. Hoyt*, 149 U. S., 1, 15, the discontinuance of the service, in the conditions and circumstances set forth in the petition, cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, and they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterward happened.

It would be unreasonable to suppose it to have been within the contemplation of the contracting parties here that the government had the right to do or would do that which was done by the order of the Department August 11, 1908. Had such a thing been within the contemplation of the contractor he would have felt himself obliged to name such increased rate of compensation as would have made him safe and whole against such an act or proceeding by the Postmaster General (Rec. 7, 9, 14).

3. In the case of *U. S. v. Utah, Nev. & Cal. Stage Co.*, 199 U. S., 414, Mr. Justice Day differentiated *Slavens v. U. S.*, 196 U. S., 229, by pointing out (p. 422) that there "it happened that the burden upon the contractor was not increased," but the case is interesting otherwise.

Slavens entered into a contract for transporting the mails in Boston, Brooklyn and Omaha. This was city service. During the terms of the Boston and Brooklyn contracts the Postmaster General determined to carry certain of the mails on electric street railway lines. "In

both cases the appellant was offered the privilege of continuing the contract for the reduced service, but refused to do so in each case" (p. 230). The Postmaster General discontinued the Boston and Brooklyn contracts and afterwards relet the same service, as thus reduced, to another contractor, for the remaining seventeen months of the contract period. This court held that the Postmaster General had the power to do what he did concerning those contracts and the reletting of the remaining service. The court declined (p. 234) to say that the Postmaster General, merely for the purpose of reletting the contract at a lower rate, might advertise and relet precisely the same service for the purpose of making a more favorable contract for the government, no change having arisen in the situation except the desire for a better bargain.

And the court also said, page 235: "In the present case the findings of fact *do not disclose a case of the arbitrary exercise of power.* A new means of service within the district by means of the street railway was deemed by the Postmaster General to be required in the public interest." (Italics ours.)

And again (p. 235) the court said: "Under the Postal Regulations it appears that the contractor is given the opportunity to perform the reduced service at a lower rate. This he was not obliged to do, and, in the present case, declined to undertake."

The court then took up the regulations and (p. 237) said: "We think this change of service was fairly within the power reserved to the Postmaster General, and the right given to him to designate such changes in the service as the public interest might require in the performance of this contract."

The court guarded the language of its opinion with care, and it is not to be interpreted as giving to the Postmaster General the right to exercise power arbitrarily, or capriciously, or oppressively, or unreasonably to the great damage of the contractor.

In the statement of the case (p. 229) Mr. Justice Day referred for fuller details to the finding in the Court of Claims, 38 C. Cl., 574. By turning to finding XIV, XV, p. 582 of that report, it will be seen that Slavens had been offered previously the privilege of continuing the service at a reduction from the contract rate in the Boston case, which he declined, and thereupon, "in order to have the service as thus reorganized performed," the service by Slavens was discontinued, and "immediately thereafter defendants relet the same service as decreased . . . to another for the balance of the contract period."

We submit that it is clear that there was no arbitrary, capricious, oppressive or unreasonable action by the Postmaster General in that case. On the contrary, Slavens was given every reasonable opportunity to prevent or at least diminish his losses, but nothing of the kind was done in the case at bar by the Postmaster General. The failure of that officer to do in this case what was done by him in the *Slavens case* indicates a marked disregard of the contractor's welfare, to say the best of it, and it does not matter that the officer was not directed or required to do those things by the contract or the law. The failure of the officer to do those things, the existing state of things and the nature of the obligations being considered, is quite material in considering whether his conduct in discontinuing the contract was abritary

or not, capricious or not, oppressive or not, reasonable or unreasonable.

The contractor was entitled to fair play, and the officer could have given it to him, for there was neither law nor contract to forbid.

4. A case relied upon below in part by counsel for the defense was *Garfielde v. U. S.*, 93 U. S., 242. There the Postmaster General made a contract with Garfielde March 2, 1874, and the service was discontinued the month following. Garfielde sued for one month's extra pay and this court held that the regulations empowered the Postmaster General to discontinue the service and allow one month's extra pay. Garfielde had made a proposal that was accepted by the Department in the form of a letter, but no formal contract was drawn.

The case turned on the power of the Postmaster General to discontinue the service under the regulations, and this court held that he had that power.

IV.

The Regulations Considered.

The long existing regulations are of importance here because their substance was incorporated in the contract.

The petition (pp. 6, 7) copies certain long existing regulations and it avers that the one existing at the date of the contract was not drawn and promulgated with reference to the conditions existing in Alaska on this route during the contract period, but it was drawn and promulgated with reference to conditions existing with-

in the limits of the United States and exclusive of that route in Alaska.

Those averments are in harmony with our argument that the contract, as well as the regulations underlying it, must be considered and construed in connection with the knowledge the parties had as to the state of things existing along the route and in that part of Alaska.

The underlying regulation, Sec. 1277 (Rec. 7) is of no importance further than as it formed the basis for the contract provisions that we have been discussing. The fact that it was drawn and promulgated in 1893, thirteen years before the making of the contract in suit, February 1, 1906, long before Route 78108 was in existence, and long before there was any development of Alaska beyond the sea coast, is conclusive proof that it was not drawn with reference to the state of things described in the petition.

The contract provision under consideration here is plainly bottomed on Regulation 1277, and it is squarely averred in the petition (Rec. 7) that, in the preparation of the proposal and contract, the government officials *adopted the regulation in force, and the contract form long in use*, and without particular regard to the physical, climatic, or other conditions then existing or that might exist along the route during the contract period. All this brings the regulation and the contract itself within the rules of law that we are contending for the application of in this case. These allegations are of such a nature as to require the court to consider the facts alleged in determining what construction shall be put upon the contract in order that the intent may prevail, if our views of the law be sound.

V.

Annulment and Discontinuance.

"Annul" and "discontinue" are not equivalent or synonymous terms.

This is not a case of annulment. The Postmaster General had the power of annulment, under certain conditions elaborately set forth in the contract (Rec. 5) but this case does not fall within that stipulation. What the Postmaster General did was under his construction of the contract provision on p. 6, and it is on that provision that the case turns. In the case at bar there was a "discontinuance" only. The use of the word "annul" as equivalent to the word "discontinue" is inaccurate in cases of this kind, no matter whether found in the briefs of counsel or in the opinions of the courts, as we submit.

VI.

The Measure of Damages.

The damages here include loss of profits and loss of property.

1. That a contractor may recover the amount of profits lost is clearly established by—

Hinckley v. Pittsburgh, etc., Steel Co., 121 U. S., 264, 275;

Anvil Min. Co. v. Humble, 153 U. S., 540, 549;

Bochm v. Horst, 178 U. S., 1, 15.

2. It is a fundamental rule that the injured contractor is entitled to be made whole. In the application of this rule, damages are allowed for his personal property lost.

Figh's case, 8 C. Cls., 319, 324, 325;
Roetinger's case, 26 C. Cls., 391, 398, 408.

We submit that the judgment of the court below should be reversed.

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IN THE

Supreme Court of the United States.

JOHN MILLER,
Appellant,

vs.

THE UNITED STATES.

No. 178.

CLAIMANT'S REPLY BRIEF.

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THE UNITED STATES. } No. 178.

CLAIMANT'S REPLY BRIEF.

I.

Relations of Claimant to the Contract.

Counsel for the government (pages 9 and 10 of his brief) makes the point that there are two contracts in the petition, the first one being between Crittenden and the government, the second being the contract of sub-letting, and then he asks, "Did there not then arise a contract between the government and Miller, and does not the claim grow out of the Miller contract?" This seems to make it desirable that we should show what are the relations of Miller to the Crittenden contract for the carrying of the mails.

1. Appellant was surety for Crittenden on the contract

for the carrying of the mails (R. 2, folios 3, 4; p. 4, folios, 6, 7; p. 5, folios 8, 9) and as surety he had to furnish and expend the money necessary to perform the contract because Crittenden was unable to do so. Appellant began these expenditures soon after the execution of the contract and continued until the contract was discontinued (R. 8, folio 6; p. 10, folio 16; p. 12, folio 20, *et seq.*). On that state of facts appellant had the legal right, indeed it was his legal duty, to perform the contract, and upon such performance he became entitled to recover in his own name for the losses and damages incurred.

United States v. Hitchcock, 164 U. S., 227;
United States v. Behan, 110 U. S., 338.

2. Appellant and Crittenden, May 1, 1908, entered into a contract of sub-letting (R. 8, folios 13-15) by the terms of which appellant agreed to perform the Crittenden contract for carrying the mails, and for the same compensation. That contract of sub-letting was made and filed as required by Sections 2 and 3 of the Act of May 17, 1878, 20 Stat., 61, 62. Section 2 prohibits the sub-letting or transfer of mail contracts except upon the consent in writing of the Postmaster General. Section 3 requires the contract of sub-letting to be filed in the office of the Second Assistant Postmaster General. Whereupon certain steps are to be taken by the government officials to make payments to the sub-contractor, "under the same rules and regulations now governing the payments made to original contractors."

Those sections were considered in *Salisbury v. United States*, 28 C. Cls., 52, and it was held that, where the contract was sub-let with the consent of the Postmaster

General, a privity of contract was created between the sub-contractor and the government upon which he could maintain an action in his own name for money due under the original contract.

II.

Arbitrary and Capricious Conduct.

Counsel for the government in his brief (pages 10 to 19) argues that the petition should have pleaded explicitly that there was bad faith on the part of the Postmaster General in discontinuing the contract. The petition does not charge bad faith or indulge in epithets of any kind. Opposing counsel's argument seems to be intended as in response to part III of our original brief (pp. 22-25), where we stated the familiar rule that a contract is not to be construed so as to give an officer the power to do arbitrary, capricious, oppressive, or unreasonable things to the cost or damage of the contractor, *for it is implied that the officer will do nothing of the kind.*

We submit that it was not necessary to charge the Postmaster General with bad faith in order to state a cause of action. If the Postmaster General acted beyond his rights and powers under the contract and the law, and damages resulted therefrom to the appellant, the right of action exists, and this is true no matter what the motives of the official may have been. The rule stated on page 22 of our original brief is not a rule of pleading, but we submit that it is a rule to be applied in the construction of the contract.

This case does not involve the powers of an officer, or

engineer, or inspector, or appraiser named or described as one who should decide and whose decision should be final and conclusive upon the contractor, but we may point out the well-established rule that their decisions must be in accordance with law and contract or they are not binding.

Robertson v. Frank Bros. Co., 132 U. S., 17, 24;
Lewis v. Chicago, etc., R. R., 49 Fed., 708;
Lyon's v. United States, 30 C. Cls., 352, 365.

III.

Technical Sufficiency of Petition.

Counsel for the government (pages 23-25 of his brief) argues that the petition should have been more exact and specific in describing the damages, to which we respond:

1. The averments in the petition concerning expenditures, values, and damages are sufficient (R. 10, folio 16; pp. 12-16). They are in harmony with 2 Chitty on Plead. 16th Am. ed., 37, 38.

2. We quote and apply the following from *District of Columbia v. Barnes*, 197 U. S., 146, 154:

> The Court of Claims is not bound by special rules of pleading. The main purpose is to arrive at and adjudicate the justice of alleged claims against the United States.
> *United States v. Burns*, 12 Wall., 246, 254;
> *United States v. Behan*, 110 U. S., 338, 347.

3. In proving damages it will be necessary for claim-

ant to comply strictly with the rules of evidence, and it will be incumbent on the court below to make clear and specific findings on the subject. Should it be found desirable the government may file a motion to make the petition more specific. The demurrer cannot be made to take the place of such a motion.

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